IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.436 OF 1986

1. Yusuf Baig Ahmed Baig
2. Yasin Baig Ahmed Baig
(since deceased through his heirs)
2-a Mohamad Akhtar Yashin Baig ...Appellants

Vs.

1.Yakub Shukrulla Baig,
Chief Trustee of Mominpada Yakub
Baig Trust, Panvel.

1-a Shri Mohammed Mustafa Yakub Baig
Chief Trustee of Mominpada Masjid
Yakub Baig Trust, Panvel ...Respondents

Mr. H.A.Solkar for the Appellants.
Mr.Rajiv Patil for Respondents.

CORAM: A.S.OKA, J.

DATED: AUGUST 27, 2004.

ORAL JUDGMENT :

1. On July 28, 1986 this Court admitted the Second Appeal by passing the following order :

> . The substantial question of law involved in this Appeal is as to whether the additional floor constructed by the beneficiary on this structure belonging to the trust, at his expenses, could be said to be accretion to the trust property.

. In view of this question the appeal is admitted."

2. The Second Appeal was heard by me on 18th August 2004 and

on 26th August 2004. With a view to appreciate to the controversy involved in the Appeal it is necessary to refer to the facts of the case in brief. The Appeal is preferred by the original Defendant Nos.1 and 2. The Respondent is the original Plaintiff.

3. The Respondent filed a suit against the Appellants and 15 others for possession of the property described in 'Appendix B' to the plaint. In the alternative, it was prayed that if the decree in terms of the said prayer cannot be passed, the possession of the individual premises be ordered to be delivered by the respective Defendants as stated in paragraph No.10 of the plaint. The prayer for perpetual injunction was also made restraining the Defendant Nos.1 to 9 from recovering the rent in respect of the suit property. The case of the Respondent is that one Yakub Baig Isab baig who was the ancestor of the Respondents and the original Defendants Nos.1 to 9, executed a Deed of Wakf on 19th February 1909 in respect of the property described in paragraph No.3 of the plaint. The property described in paragraph No.3 is the city survey Property No.895 and the Municipal House No.895 (old No.1207) (and formerly numbered as 993) admeasuring 420 square yard together with a house thereon consisting of ground and one upper floor. The case of the Respondent is that as per the Wakfnama dated 19th February 1909 Mutavalis were appointed from time to time. The case is that though in the year 1944 four Mutavalis were

appointed, the father of the Defendant No.1/Appellant No.1 late Ahmed Baig Yakub Baig was looking after the affairs of the trust. It is stated in the plaint that in the year 1944 a suit was filed in the District Court being Civil Suit No.9 of 1944 praying for removal of Mutavali and for framing a scheme. Accordingly a scheme was framed by the District Court at Alibag in the said suit. The case of the Respondent is that the Wakf is registered as a public trust under Bombay Public Trusts Act,1950. It is stated that the Respondent i.e. Yakub Baig and the original Defendant No.17 were the only surviving trustees and the Respondent had made an Application No.4 of 1971 to the District Court, Alibag for appointment of trustees. It is contended that by order dated 21st July 1971 the District Court had appointed the Respondent/Plaintiff Yakub Baig to act as the Chief Trustee till the appointment of trustees and to file suits on behalf of the Trust.

4. The case of the Respondent is that initially house No.993 was a single storeyed house. Subsequently, four rooms were constructed on the ground floor and thereafter, the first floor was constructed on the entire ground floor. The case of the Respondent is that as per the Wakfnama of the year 1909, a provision was made in the said house for the residence of Ahmed Baig and his family members and his successors. However, house No.993 vested in the trust. Though right is conferred by Wakfnama on Ahmed Baig and his

successors to reside in the said house, they have no right to use the house for any other purpose and to dispose of the same. The case of the Respondent is that the Defendant Nos.1 and 2 i.e. the Appellants are the sons of Ahmed Baig and original Defendant Nos.3 to 8 are the grandsons of deceased Ahmed Baig. the original Defendant No.9 is the daughter in law of deceased Ahmed Baig It is alleged that the original Defendant Nos.1 to 8 have been inducting the tenants in the suit house and are earning the profits. The case of the Respondent is that the Defendant Nos.1 to 9 are in possession of one room on the ground floor in the south-west corner and the adjoining room on its northern side. The case is that rest of the ground floor has been let out by the original Defendant Nos.1 to 9 in favour of the original Defendant Nos.10,11,12 and 15 as tenants. It is further alleged that one room on the first floor in its south-east corner has been let out to the Defendant No.13 and one room each on the first floor has been let out in favour of the Defendant Nos.15 and 16. The allegation is that the said tenants are inducted by the original Defendant Nos.1 to 8. After issuing legal notice, the suit was filed by the Respondent. In 'Appendix A' to the plaint the house property has been described and the 'Appedix B' consists of the sketches showing the suit house and open space around the suit house with reference to the rooms in possession of the various Defendants.

5. The suit was contested by the Appellant No.1-Defendant

No.1 by filing a detailed written statement. In paragraph No.4 of the written statement the Appellant No.1 admitted that the suit property is bearing municipal house No.895 and earlier number of the suit property was 1207. However, the Appellant No.1 denied that the said house was also given House No.993. The Appellant No.1 also disputed the plans annexed to the plaint. According to the Appellant No.1 when Wakfnama was executed in the year 1909, house No.993 was not vesting in the said Yakub Baig who executed Wakfnama. The Appellant No.1 relied upon the order passed in earlier Regular Civil Suit No.70 of 1957 and contended that a fresh suit cannot be brought by the Respondent against the Defendants. A contention was raised that the suit was barred by limitation and that permission of the Charity Commissioner ought to have been obtained.

6. The Appellant No.1 stated that the suit property is not of the ownership of the Respondent. The municipal house numbers given to the property were changed from time to time. A specific contention was raised by the Appellant No.1 that the house presently in existence, the land below the said house and the land abutting the said house was never owned by Yakub Baig or the Masjid. It is stated that at the place where the suit house was standing, there was a house owned by one Digodkar who was the owner of the said house and the land on which the said house was constructed. The Appellant No.1 stated that in the year 1890 deceased Yakub Baig was put in

possession of the suit property by Digodkar as a mortgagee. The said property was numbered as municipal house No.1004. There was a municipal house No.1003 in possession of the father of the Appellant No.1 and a part of house No.1003 was amalgamated with the house No.1004. It is stated that subsequently the said two houses were numbered as house Nos. 1047 and 1048. The Appellant No.1 further stated that by registered sale deed executed on 1st December,1915, the owners Digodkars sold the property No.1048 to the father of the Appellant Ahmed Baig and one Isak Baig Yakub Baig. As per the document of dissolution of partnership executed by the father of the Appellant and the said Isak Baig in the year 1917, house No.1048 came exclusively to the share of the Ahmed Baig, the father of the Appellant No.1. A case is made out that subsequently municipal house No.1047 and 1048 were numbered as House No. 1207. It is stated in the written statement that though the suit property is entered in the record of the City Survey and municipality as the property of the trust, before mutating name of the trust, the City Survey authorities did not serve any notice on the Appellant No.1. As the entries in the said record were made behind the back of the Appellant No.1, the same are not binding on him. One A.A.Khatib, the erstwhile Chief Trustee of the Trust was a member of the municipal council and was a Vice President thereof and at his instance name of Masjid was entered in the municipal record in the year 1950 and on the basis of the entries in the municipal record the property was entered in

the name of the trust in the City survey record. It is stated that the suit property was in possession of the father of the Appellants and thereafter the Appellants have been openly and continuously enjoying the possession of the suit property as owners thereof. Therefore, the suit is barred by limitation.

7. The Appellant No.1 also contended that his father was paying municipal taxes in respect of the suit property and that the Appellant No.1 has become owner thereof by adverse possession. The reliance is placed by the Appellant No.1 on Deed of Wakfnama of the year 1936 made by Ahmed Baig in respect of house No.1207 in favour of the Appellants. The case is made out that the Appellants are in possession on the basis of the said Deed of Wakf and therefore the Appellants have right to recover rent as the House was given to them for their maintenance. Lastly, it is contended that even assuming that the suit property was the property of the Trust, the Appellants being beneficiaries under the trust are entitled to let out the portion of the said property to the third parties.

8. The Appellant No.2 filed a pursis adopting the written statement filed by the Appellant No.1. However, the other Defendants did not file their written statements.

9. The Trial Court framed various issues. The Trial Court

held that the suit was maintainable and that the permission of the Charity Commissioner was not necessary for instituting the suit. The Trial Court also accepted that the description of the suit property given in the plaint was correct. The Trial Court held that the Respondent has established the title to the suit property as Wakf property as pleaded in the plaint and that the original Defendant Nos.1 to 9 had a right to reside in the said property and that they have no right to let out the same. However, the learned Trial Judge held that the Defendant Nos.1 to 9 were entitled to continue in occupation of that much portion of the suit property which was originally bearing Property No.993. The Trial Court therefore dismissed the suit as against the Defendant Nos.1 to 9. However, the Trial Court decreed the suit by passing the decree for possession in respect of the portion of the suit house which was in possession of the Defendant Nos.10 to 16 and by passing a Decree for possession in respect of the newly constructed portion of the house against the original Defendant Nos.1 to 9.

10. An Appeal was preferred by the present Appellants against the Judgment and Decree of the Trial Court. The Defendant Nos.3 to 17 were impleaded as party Respondents to the said Appeal. The learned District Judge, Raigad at Alibag dismissed the said Appeal by Judgment and Decree dated 19th April 1986.

11. Shri Solkar, learned Counsel appearing for the Appellants submitted that the basic issue canvassed before the learned District Judge was that Yakub Baig was not the owner of the property in respect of which the Deed of Wakf was purportedly executed in the year 1909. He submitted that property of Digodkar was mortgaged in favour of Yakub Baig on 17th January 1890 and the said property was purchased by registered Sale Deed from the said Digodkar by Ahmed Baig i.e. father of the Appellant No.1 along with Isak Baig. He submitted that when the Deed of Wakf was executed in the year 1909, Yakub Baig was a mortgagee who had no right to create a Wakf. He submitted that by virtue of the Deed of Dissolution executed in the year 1917, the father of the Appellants became owner of the property. He also pointed out that on 6th April 1936 Ahmed Baig i.e. father of the Appellants executed a Deed of Wakf in respect of a portion of house No.1207 (old house no.1047). He contended that under the Deed of Wakf the Appellant No.1 and his brother i.e. Appellant No.2 were appointed as Mutavalis and they were placed in possession of the said property. He submitted that under the said Deed of Wakf the Appellants had other rights in respect of the suit property such as right to recover rent and therefore, they had right to induct the tenant in the suit property and recover rent from the suit property.

12. He submitted that the Appellate court has framed only one point for determination limited to the dispute regarding

right of the Defendant Nos.1 to 9 in respect of the suit property and whether the said Defendants had authority to let out the said property. He pointed out that a specific contention was raised before the Appellate Court which is noted in the paragraph No.9 of the Judgment that the Defendant Nos.1 to 9 should have been held as owners of the suit property. By referring to the paragraph No.11 of the Judgment of the Appellate Court, he pointed out that the Appellate Court proceeded on erroneous assumption that Deed of Wakf executed in the year 1909 by Yakub Baig was legal and valid. He also invited my attention to observation made in the paragraph No.11 of the Judgment wherein it is observed that it was an admitted position between the parties that the suit property belongs to the Respondent and even if it is accepted that some portion of the property was constructed later on still that property irrespective of all this construction by anybody would be property of the trust. He submitted that no such admission was ever given by the Appellants. He submitted that the Appellate Court failed to frame proper points for determination as required by Rule 31 (a) of Order XLI of the Code of Civil Procedure, 1908. He submitted that in the circumstances order of remand will have to be passed and the matter will have to be remanded to the Appellate Court.

13. The learned Counsel appearing for the Respondent Shri Patil submitted that the Appellate Court decided the points

which were argued before it and it does not appear from the Judgment of the Appellate Court that the contentions raised before this Court on basis of the mortgage Deed of 1890 and Sale Deed of 1915 are urged before the Appellate Court.

14. Shri Patil submitted that on the basis of admission given by the Appellant No.1, the Trial Court has held that the suit property was the property of Wakf and the Defendant Nos.1 to 9 being beneficiaries under the Deed of Wakf of the year 1909 had a limited right of only residing in the suit property, and they could not have inducted any third party and recovered the rent from them. He submitted that description of the property subject matter of the mortgage of 1890 was totally different and obviously therefore, the mortgaged property had nothing to do with the suit property. He submitted that as Deed of Wakf was already executed in the year 1909, the Appellants cannot have any right,title or interest on the basis of the Deed of Wakf made by Ahmed Baig in the year 1936. He pointed various admissions on record given by the Appellant No.1.

15. After making submissions, the Counsel for both the parties agreed that even if this Court is of the view that order of remand will have to be passed, both of them had no objection if issues of facts are considered by this Court and findings are recorded on the basis of the evidence on record.

16. Section 103 of Code of Civil Procedure, 1908 (hereinafter referred to as the said Code) reads thus :

> **103. Power of High Court to determine issue of fact** : In any second appeal, the High Court may, if the evidence on record is sufficient, determine any issue necessary for the disposal of the appeal -
>
> (a) which has not been determined by the lower appellate Court or both by the Court of first instance and the lower appellate Court, or
>
> (b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred to in section 100.

The said Section gives power to the High Court to determine any issue necessary for the disposal of the Appeal which has not been determined by the lower Appellate Court or the Court at first instance or when such issue is wrongly determined by such Court or Courts. The said power can be exercised provided the evidence on record is sufficient. In the facts of the case before me the Counsel for the parties admitted that the evidence on record was sufficient to decide the controversy involved in the Second Appeal.

17. Perusal of the paragraph No.9 of the Judgment of the Appellate Court shows that a contention was very much raised on behalf of the Appellants that the Defendant Nos.1 to 9 should have been held as owners of the suit property. The said contention is not decided by the Appellate Court. In the first part of paragraph No.11 of the Judgment, the

learned District Judge referred to the submissions made on behalf of the Appellants on the basis of privileges of the beneficiaries and recitals in Wakfnama. However, the learned District Judge felt that it was not necessary to refer to the rights of beneficiaries. The Appellate Court has obviously not dealt with all the submissions which were made by the Appellants. Perusal of the Judgment shows that proper points for determination were not framed as contemplated by Rule 31 (a) of Order XLI of the said Code. From perusal of the Judgment of the Appellate Court it is clear to me that of the failure to abide by Rule 31 of Order XLI of the said Code has resulted into failure of justice. Considering the manner in which the Appeal has been decided by the First Appellate Court, the order of remand must normally follow. The suit is of the year 1972 and the Appeal in the District Court was of the year 1984 and therefore, it will be unjust to pass an order of remand. Since the evidence on record is sufficient to determine the issues which ought to have been decided by the lower Appellate Court, I have invoked the power of this Court under Section 103 of the said Code. Therefore, I allowed the Counsel appearing for the parties to take me through the pleadings, notes of evidence and various exhibited documents on record. With the assistance of the learned Counsel I have gone through the said documents.

18. The record of the Trial Court discloses that all the documents produced by both the parties were admitted in

evidence by consent. The first dispute between the parties seems to be as regards description and the identity of the suit property. The said dispute basically arose as Defendant Nos.1 to 9 relied upon the Sale Deed executed in December 1915 by one Digodkar and his family members in favour of Isak Baig and Ahmed Baig. The Sale Deed is in respect of the house property No.1048 which according to the Defendant Nos.1 to 9 is the description of the property in the suit. Based on the said Sale Deed a contention was raised by the Defendant Nos.1 to 9 that the suit property was mortgaged by the said Digodkar in favour of Yakub Baig in the year 1890 and the said property was purchased by the sons of Yakub viz. Ahmed Baig and Isak Baig in the year 1915 from the Digodkar family. The case made out by the Appellants is that by virtue of subsequent document i.e. Deed of Dissolution between the father of the Appellant Ahmed Baig and the said Isak Baig, the father of the Appellants became owner thereof. In this connection a references will have to be made to the written statement filed by the Appellant No.1. In paragraph No.4 of the written statement by the Appellant No.1 it is admitted that the suit property is numbered as municipal house No.895. According to the Appellant No.1 House No.993 was not the old number of the suit property. As pointed out earlier it is contended that there was a mortgage executed in favour of Yakub Baig in the year 1890 in respect of the suit property and the suit property was numbered as municipal House No.1004 and subsequently part of the adjoining house

No.1003 was amalgamated with house No.1004 and was thereafter numbered as House Nos.1047 and 1048. The House No.1048 was purchased by the father of the Appellants and his brother by the Sale Deed dated 1st December 1915. A specific contention is raised that municipal house Nos.1047 and 1048 were numbered as House No.1207. In the light of the said contentions raised in the written statement, it will be necessary to refer to the oral evidence of the Appellant No.1. In paragraph No.8 of his cross examination, the Appellant No.1 stated that in the year 1909 when the Deed of Wakf was executed, the suit house was bearing the municipal house No.993 and presently it is numbered as municipal house No.895. He also stated that the suit house was given municipal house No.1047 and subsequently House No.1207. He stated that there was a chawl adjoining the suit house owned by the trust which was numbered as Municipal House No.894. The Appellant No.1 specifically admitted that the suit house was never assigned the municipal house No.1048. In paragraph No.9 of the deposition, the Appellant No.1 admitted that the property in which the suit house was standing bears City Survey No.895. Again in paragraph No.10 of the deposition the Appellant no.1 admitted that municipal house No.993 is subject matter of the Deed of Wakf executed in the year 1909. It is thus admitted by the Appellant No.1 in his evidence that the suit property was old house No.993 which was City Survey No.895 and the old house Nos.1047 and 1207. The same numbers which are referred to above in the cross examination

of the Appellant No.1 have been used to describe the suit property in paragraph No.3 of the plaint. It is to be borne in mind that the Sale Deed dated 1st December 1915 is specifically in respect of the municipal house No.1048 and the Appellant No.1 admitted in the cross examination that the suit house subject matter of the suit was never assigned municipal house No.1048. The said admissions given by the Appellant No.1 are very clear and thus on the face of it the Sale Deed dated 1st December 1915 which is relied upon by the Appellant cannot relate to the suit property. At this stage it will be necessary to refer to the Judgment of the learned Trial Judge. The learned Trial Judge has referred to practically each and every document on record and the description of the suit property which is reflected from the said documents. The Trial Court has also referred to the aforesaid admission given by the Appellant No.1. The findings by the Trial Court in paragraph No. 37 to 43 of its Judgment are recorded after due consideration of oral and documentary evidence of the parties.

19. In paragraph No.2 of the examination-in-chief of the Appellant No.1, a case was sought to be made out that the suit property was purchased by their father and uncle under the Sale Deed of 1915. In paragraph No.2 of the deposition the Appellant No.1 has stated that after sale deed was executed in favour of his father and uncle in respect of the suit house, the said property was given to their father by a

Deed of Dissolution and a certified copy of which is produced on record. The Appellant No.1 further stated in his deposition that his father executed Wakfnama in respect of the suit property on 6th April 1936 in favour of the Appellants. He stated that the expenses of construction of first storey of the house were borne by his father. In paragraph No.7 of his cross examination he stated that he was in possession of the suit property as owner from 1936 onwards. Obviously, reference in paragraph No.7 has to be to the alleged rights acquired by the Appellants under the Deed of Wakf dated 6th April 1936. Thus case made out by the Appellants is that the Deed of Wakf was executed by their father in respect of the property which was purchased in the year 1915. Perusal of Deed of Wakf shows that the same is executed in respect of the property bearing house no.1047 and 1207 and open space abutting the House. The property which father of the Appellants purchased on the basis of Sale Deed dated 1st December 1915 is not house No.1047. The Sale Deed relates only to House No.1048 as stated to earlier. The Appellant No.1 clearly admitted that the suit house was numbered as Municipal House No.1047 and municipal house No.1207. It is thus the apparent that on the basis of rights allegedly acquired under the Sale Deed dated 1st December 1915 the father of the Appellants Ahmed Baig could not have executed Wakfnama in respect of the suit house bearing No.1047 and 1207. The case of the Appellants was based only on the aforesaid two documents and from the admissions of the

Appellant No.1 it is very clear that they cannot claim that their father was the owner of the suit house on the basis of the said Sale Deed dated 1st December 1915.

20. In paragraph No.8 of the cross examination the Appellant No.1 Yusuf Baig has stated that "my father Ahmed Baig was the trustee of the Plaintiff trust from the year 1909 to 1948". Thus, the Appellant No.1 has clearly admitted that there was a Wakf in existence from the year 1909. The reference to the said Wakf cannot be one which relates to Wakf allegedly created in the year 1936. If the case made out by the Appellant No.1 in paragraph No. 8 of the cross examination is true, obviously his father Ahmed could not have created Wakf in respect of the suit property in the year 1936 because from the year 1909 he was already acting as Trustee/Mutawali of the Wakf. Therefore, this is one more reason which clearly defeats the case of the Appellants regarding ownership of their father in respect of the suit house on the basis of the document of the year 1915.

21. The Appellant No.1 has stated that he was the Trustee of the Plaintiff-Trust from the year 1960 to 1963. So even according to him his father was the trustee for 39 years and he himself was the trustee for three years. This is also the reason as to why the Appellants could produce bills, receipts as regards payment of property taxes in respect of the suit house. Reference will have to be made to the Judgment in

Regular Civil Suit No.9 of 1944 by which the District Judge, Thane accepted the resignation of Ahmed Baig and directed that he should continue to act as trustee till the appointment of new trustee is made. The Deed of Wakfnama of the year 1909 also referred to the fact that Yakub allowed house No.993 to be used by his son Ahmed Baig for the purpose of his residence. The said document also refers to the fact that Ahmed Baig was also one of the trustee.

22. The learned Trial Judge has extensively referred to the evidence of the Respondent. Shri Solkar appearing for the Appellants has referred to the paragraph No.3 of the deposition of the Respondent. The paragraph No.3 reads thus:

> . "The suit property had original municipal numbers 993, then it was numbered as 1047, then it was numbered as 1207 and now it is numbered as 895 while the C.T.S.No. is 895 since its beginning. The area of the suit land is about 420 square yards. The boundaries of the suit property are mentioned in details by me in paragraph 3 of the plaint. At present the suit property has a first floor. I have produced the documentary evidence from the Municipal record as to how the original municipal number 993 was changed from time to time. The present Municipal House No.895 had original Municipal House No.993 and it is one and the same house property. The suit house had originally Municipal No.993 when the Wakfnama in 1909 was prepared. At that time the suit house was one storied building. Thereafter, it is converted into two storied building and it is also extended on the ground floor. I have produced the maps in the Schedules at A and B to show the respective positions of the suit house. In the Wakfnama the suit property is shown as a trust property on page 73 of the said original Wakfnama. In the P.T.S.Extract which is

> submitted before the Charity Commissioner at the time of the registration of trust, this Municipal House No.993 was also included as a trust property. This house property is considered as a trust property since 1909. The Municipal taxes and other taxes in respect of this trust property are also paid from the assets of the Trust. I have produced Municipal extracts to show that the trust is paying all the municipal taxes of the suit property."

If the said paragraph is read it is stated that the suit property was given house No.993, 1047 and 1207 respectively at different stages and it is numbered as City survey No.895 from the beginning. He stated that area of that suit land is 420 sq.yards. He has described that the suit house was a single storeyed building in the year 1909 it was converted into double storeyed building subsequently and even the ground floor was extended. It is pertinent to note that the Respondent has not referred to the house No.1048 which is subject matter of the sale deed executed in favour of the father of the Appellants. Reference will have to be made to the cross examination of the Respondent which runs in to only three paragraphs. One suggestion given to the Respondent is that the suit house was originally belonging to one Digodkar which was denied by him. He has also denied that the suit house was mortgaged in favour of the Yakub Baig. There is no suggestion given that the suit house No.1048 is itself a trust property which is subject matter of the suit.

23. The Appellants have relied upon the recital in the sale

deed of year 1915 to show that mortgage was executed by the said Digodkar in favour of Yakub Baig. There is nothing to show that the mortgage was as regards the property bearing House No.993 or 1207 or 1047 which is subject matter of the suit. On the contrary from the said recitals it is clear that the mortgage was in respect of House No.1048.

24. Even assuming that Yakub Baig was mortgagee of the suit House in the year 1909 unless it is shown that rights in respect of the suit property were acquired by the father of the Appellants, it cannot be said that Yakub had no power to create a Wakf. It is to be borne in mind that from the year 1909 the father of the Appellants acted as one of the Mutavalis of the said trust. The Deed of Wakf of the year 1909 recites that the suit property i.e. house no.993 was allowed to be used by the father of the Appellants as a beneficiary. Therefore, no fault can be found with the finding of the Trial Court which came to the conclusion that the suit property was the trust property.

25. Once it is held that the suit property was the trust property, the rights of the father of the Appellants will be governed by the recitals in the Deed of Wakf. The recitals in the Deed of Wakf clearly provide that the facility is given to the father of the Appellants to reside in the suit property and the right was extended to the successors and heirs of the father of the Appellants. The Deed of Wakf does

not give any specific power to the beneficiaries i.e. sons and grandsons of Ahmed Baig either to make any further construction for their own benefit or to induct tenants in the house property and recover rent from themselves. It is to be borne in mind that the father of the Appellant No.1 was acting in duel capacity as a Trustee and beneficiary. Though as beneficiary, he might have been permitted to occupy the suit property, that does not give him right to let out the suit property and take income from the tenants.

26. It is pertinent to note that though a prayer for possession was made in the suit as against Defendant Nos.1 to 9 who were beneficiaries under the Deed of Wakf of 1909, the said prayer was not granted. The decree which was passed for possession as against the Defendant Nos.10 to 16 in respect of the original portion of the house and the Decree for possession as against Defendant Nos.1 to 9 was passed only in respect of newly constructed portion which they were not authorised to construct. Once it is held that the suit property is property of the the trust, it is obvious that none of the beneficiaries had any right to construct additional rooms and to let out the same to the third parties.

27. There is one more aspect of the matter, the record of the Second Appeal shows that the Trial Court passed a Decree against all the Defendants. Only the present Appellant

preferred an Appeal to the District Court to which all other Defendants were impleaded as party Respondents. However, in the memorandum of the Second Appeal none of the other Defendants save and except the Appellants herein have been impleaded as parties. Though it is possible to say that the Decree against the Defendant Nos.1 to 9 being joint and indivisible in nature has attained finality as against the Defendant Nos.3 to 9, I have not gone into technical aspect of the matter as the Second Appeal is of the year 1986 and till today no such objection was raised by the Respondent who was the original Plaintiff.

28. In so far as the Judgment of the Appellate Court is concerned, though the aspect of ownership may not have been discussed in detail a finding has been recorded that the Defendant Nos.1 to 9 were not entitled to let out the portion of the trust property and appropriate the rent. The Appellants have only a right of residence as provides in the Wakfnama.

29. There is no merit in the Second Appeal and same is dismissed with no order as to costs.

Judge.